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Committee on Oversight and Government Reform
Subcommittee on National Security and Foreign Affairs

Subcommittee Hearing:
"Drones II"

Submission of
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Honorable Chairman and Members:

Introduction

My name is Michael Lewis and I am a professor of law at Ohio Northern University's Pettit College of Law where I teach International Law and the Law of Armed Conflict. I spent over 7 years in the U.S. Navy as a Naval Flight Officer flying F-14's. I flew missions over the Persian Gulf and Iraq as part of Operations Desert Shield/Desert Storm and I graduated from Topgun in 1992. After my military service I attended Harvard Law School and graduated *cum laude* in 1998. Subsequently I have lectured on a variety of aspects of the laws of war, with an emphasis on aerial bombardment, at dozens of institutions including Harvard, NYU, Columbia and the University of Chicago. I have published several articles and co-authored a book on the laws of war relating to the war on terror. My prior experience as a combat pilot and strike planner provides me with a different perspective from most other legal scholars on the interaction between law and combat.

In preparing this submission I have reviewed the testimony of the other witnesses that appeared before this Subcommittee on March 23 and April 28 as well as the speech given by Harold Koh, the State Department's Legal Adviser on Mar. 25, 2010.

The Current Laws of War are Sufficient to Address the Drone Question

As a number of witnesses have already stated, there is nothing inherently illegal about using drones to target specific individuals. Nor is there anything legally unique about the use of unmanned drones as a weapons delivery platform that requires the creation of new or different laws to govern their use. As with any other attack launched against enemy forces during an armed conflict, the use of drones is governed by International Humanitarian Law (IHL). Compliance with current IHL that governs aerial bombardment and requires that all attacks demonstrate military necessity and comply with the principle of proportionality is sufficient to ensure the legality of drone strikes. In circumstances where a strike by a helicopter or an F-16 would be legal, the use of a drone would be equally legitimate. However, this legal parity does not answer three fundamental questions that have been raised by these hearings. Who may be targeted?

Where may they be targeted? And finally who is allowed to pilot the drones and determine which targets are legally appropriate?

Who May be Targeted?

In order to understand the rules governing the targeting of individuals, it is necessary to understand the various categories that IHL assigns to individuals. To best understand how they relate to one another it is useful to start from the beginning.

All people are civilians and are not subjected to targeting unless they take affirmative steps to either become combatants or to otherwise lose their civilian immunity. It is important to recognize that a civilian does not become a combatant by merely picking up a weapon. In order to become a combatant an individual must be a member of the "armed forces of a Party to a conflict."[1] This definition is found in Article 43 of Additional Protocol I to the Geneva Conventions. It goes on to define the term "armed forces" as:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.[2]

The status of combatant is important because combatants "have the right to participate directly in hostilities".[3] This "combatants' privilege" allows privileged individuals to participate in an armed conflict without violating domestic laws prohibiting the destruction of property, assault, murder, etc. The combatant's conduct is therefore regulated by IHL rather than domestic law.

Combatant status is something of a double-edged sword, however. While it bestows the combatant privilege on the individual, it also subjects that individual to attack at any time by other parties to the conflict. A combatant may be lawfully targeted whether or not they pose a current threat to their opponents, whether or not they are armed, or even awake. The only occasion on which IHL prohibits attacking a combatant is when that combatant has surrendered or been rendered *hors de combat*.[4] Prof. Geoff Corn has

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (API) Art. 43(2). Although the United States has not ratified Protocol I, it recognizes much of Protocol I as descriptive of customary international law.
[2] Art. 43(1).
[3] Art. 43(2).
[4] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Art. 12 and Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Art. 13.

argued compellingly that this ability to target based upon status, rather than on the threat posed by an individual, is the defining feature of an armed conflict.

After examining the definition of combatant, it becomes apparent that combatant status is based upon group conduct, not individual conduct. Members of al Qaeda are not combatants because as a group they are not "subject to an internal disciplinary system which [enforces] compliance with the rules of international law applicable in armed conflict." It does not matter whether an individual al Qaeda member may have behaved properly he can never obtain the combatants' privilege because the group he belongs to does not meet IHL's requirements. Prof. Glazier's testimony that al Qaeda and the Taliban could possess "the basic right to engage in combat against us" is mistaken. These groups have clearly and unequivocally forfeited any "right" to be treated as combatants by choosing to employ means and methods of warfare that violate the laws of armed conflict, such as deliberately targeting civilians.

If al Qaeda members are not combatants, then what are they? They must be civilians, and civilians as a general rule are immune from targeting.[5] However, civilians lose this immunity "for such time as they take a direct part in hostilities."[6] The question of what constitutes direct participation in hostilities (DPH) has been much debated. While DOD has yet to offer its definition of DPH, the International Committee of the Red Cross (ICRC) recently completed a six-year study on the matter and has offered interpretive guidance that, while not binding on the United States, provides a useful starting point. The ICRC guidance states that "members of organized armed groups [which do not qualify as combatants] belonging to a party to the conflict lose protection against direct attack for the duration of their membership (i.e., for as long as they assume a continuous combat function)."[7]

The concept of a "continuous combat function" within DPH is a reaction to the "farmer by day, fighter by night" tactic that a number of organized armed terrorist groups have employed to retain their civilian immunity from attack for as long as possible. Because such individuals (be they fighters, bomb makers, planners or leaders) perform a continuous combat function, they may be directly targeted for as long as they remain members of the group. The only way for such individuals to reacquire their civilian immunity is to disavow membership in the group.

So the answer to "Who may be targeted?" is any member of al Qaeda or the Taliban, or any other individuals that have directly participated in hostilities against the United States. This would certainly include individuals that directly or indirectly (e.g. planting IED's) attacked Coalition forces as well as any leadership[8] within these organizations. Significantly, the targeting of these individuals does not involve their elevation to

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[5] API Art. 51(2).
[6] API Art. 51(3).
[7] http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-faq-020609
[8] If these groups established a political arm (similar to Sinn Fein in Northern Ireland) whose members solely participated in the political process, those leaders could not be targeted, however these groups have shown little inclination to engage in the political process.

combatant status as Prof. O'Connell implied in her testimony. These individuals are civilians who have forfeited their civilian immunity by directly participating in hostilities. They are not, and cannot become, combatants until they join an organized armed group that complies with the laws of armed conflict, but they nevertheless remain legitimate targets until they clearly disassociate themselves from al Qaeda or the Taliban.

Where May Attacks Take Place?

Some witnesses have testified to this Subcommittee that the law of armed conflict only applies to our ongoing conflict with al Qaeda in certain defined geographic areas. Prof. O'Connell states that the geographic limit of the armed conflict is within the borders of Afghanistan while others include the border areas of Pakistan, and Iraq. They take the position that any operations against al Qaeda outside of this defined geography are solely the province of law enforcement which requires that the target be warned before lethal force is employed. Because drones cannot meet this requirement they conclude that drone strikes outside of this geographical area should be prohibited. The geographical boundaries proposed are based upon the infrequency of armed assaults that take place outside of Afghanistan, Iraq and the border region of Pakistan. Because IHL does not specifically address the geographic scope of armed conflicts, to assess these proposed requirements it is necessary to step back and consider the law of armed conflict as a whole and the realities of warfare as they apply to this conflict.

One of the principal goals of IHL is to protect the civilian population from harm during an armed conflict. To further this goal IHL prohibits direct attacks on civilians and requires that parties to the conflict distinguish themselves from the civilian population. As a result, it would seem anomalous for IHL to be read in such a way as to reward a party that regularly targets civilians, and yet that is what is being proposed. As discussed above, a civilian member of al Qaeda who is performing a continuous combat function may be legitimately targeted with lethal force without any warning. But the proposed geographic limitations on IHL's application offer this individual a renewed immunity from attack. Rather than disavowing an organization that targets civilians, IHL's preferred result, the proposed geographic restrictions allow the individual to obtain the same immunity by crossing an international border and avoiding law enforcement while remaining active in an organization that targets civilians. When law enforcement's logistical limitations are considered, along with the host state's ambivalence for actively pursuing al Qaeda within its borders, it becomes clear that the proposed geographical limitations on IHL are tantamount to the creation of a safe haven for al Qaeda.

More importantly these proposed limitations would hand the initiative in this conflict over to al Qaeda. Militarily the ability to establish and maintain the initiative during a conflict is one of the most important strategic and operational advantages that a party can possess. To the extent that one side's forces are able to decide when, where and how a conflict is conducted, the likelihood of a favorable outcome is greatly increased. If IHL is interpreted to allow al Qaeda's leadership to marshal its forces in Yemen or the Sudan, or any number of other places that are effectively beyond the reach of law enforcement and to then strike at its next target of choice, whether it be New York, Madrid, London,

Bali, Washington, DC or Detroit, then IHL is being read to hand the initiative in the conflict to al Qaeda. IHL should not be read to reward a party that consistently violates IHL's core principles and as Prof. Glazier points out in his reference to the Cambodian incursion, it was not read that way in the past.

Those opposed to the position that IHL governs the conflict with al Qaeda regardless of geography, and therefore allows strikes like the one conducted in Yemen in 2002, have voiced three main concerns. The first concern is that the United States may be violating the sovereignty of other nations by conducting drone strikes on their territory. It is true that such attacks may only be conducted with the permission of the state on whose territory the attack takes place and questions have been raised about whether Pakistan, Yemen and other states have consented to this use of force. This is a legitimate concern that must be satisfactorily answered while accounting for the obvious sensitivity associated with granting such permission. The fact that Harold Koh, the State Department's Legal Advisor, specifically mentioned the "sovereignty of the other states involved"[9] in his discussion of drone strikes is evidence that the Administration takes this requirement seriously.

The second concern is that such a geographically unbounded conflict could lead to drone strikes in Paris or London, or to setting the precedent for other nations to employ lethal force in the United States against its enemies that have taken refuge here. These concerns are overstated. The existence of the permission requirement mentioned above means that any strikes conducted in London or Paris could only take place with the approval of the British or French governments. Further, any such strike would have to meet the requirements of military necessity and proportionality and it is difficult to imagine how these requirements could be satisfactorily met in such a congested urban setting.

Lastly, there is a legitimate concern that mistakes could be made. An individual could be inappropriately placed on the list and killed without being given any opportunity to challenge his placement on the list. Again, Mr. Koh's assurances that the procedures for identifying lawful targets "are extremely robust"[10] are in some measure reassuring, particularly given his stature in the international legal community. However, some oversight of these procedures is clearly warranted. While *ex ante* review must obviously be balanced against secrecy and national security concerns, *ex post* review can be more thorough. When the Israeli Supreme Court approved the use of targeted killings, one of its requirements was for transparency after the fact coupled with an independent investigation of the precision of the identification and the circumstances of the attack.[11] A similar *ex post* transparency would be appropriate here to ensure that "extremely robust" means something.

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[9] Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, www.state.gov.
[10] *Id*.
[11] *The Public Committee against Torture in Israel v. Israel*, HCJ 769/02, Supreme Court of Israel (2006).

Who May do the Targeting?

Another question raised in the hearings was the propriety of allowing the CIA to control drone strikes. Prof. Glazier opined that CIA drone pilots conducting strikes are civilians directly participating in hostilities and suggested that they might be committing war crimes by engaging is such conduct. Even if these are not considered war crimes, if the CIA members are civilians performing a continuous combat function then they are not entitled to the combatants' privilege and could potentially be liable for domestic law violations.

Therefore, if CIA members are going to continue piloting drones and planning strikes, then they must obtain combatant status. Article 43(3) of Protocol I allows a party to "incorporate[s] a paramilitary or armed law enforcement agency into its armed forces"[12] after notifying other parties to the conflict. For such an incorporation to be effective a clear chain of command would have to be established (if it does not already exist) that enforces compliance with the laws of armed conflict. Without this incorporation or some other measure clearly establishing the CIA's accountability for law of armed conflict violations, the continued use of CIA drone pilots and strike planners will be legally problematic.

Conclusion

Drones are legitimate weapons platforms whose use is effectively governed by current IHL applicable to aerial bombardment. Like other forms of aircraft they may be used to target enemy forces, whether specifically identifiable individuals or armed formations.

IHL permits the targeting of both combatants and civilians that are directly participating in hostilities. Because of the means and methods of warfare that they employ, al Qaeda and Taliban forces are not combatants and are not entitled to the combatants' privilege. They are instead civilians that have forfeited their immunity because of their participation in hostilities. Members of al Qaeda and the Taliban that perform continuous combat functions may be targeted at any time, subject to the standard requirements of distinction and proportionality.

Placing blanket geographical restrictions on the use of drone strikes turns IHL on its head by allowing individuals an alternative means for reacquiring effective immunity from attack without disavowing al Qaeda and its methods of warfare. It further bolsters al Qaeda by providing them with a safe haven that allows them to regain the initiative in their conflict with the United States. The geographical limitations on drone strikes imposed by sovereignty requirements, along with the ubiquitous requirements of distinction and proportionality are sufficient to prevent these strikes from violating international law. However, some form of *ex post* transparency and oversight is necessary to review the identification criteria and strike circumstances to ensure that they remain "extremely robust".

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[12] API, Art. 43(3).

Lastly, CIA personnel participating in drone strikes, as opposed to drone surveillance missions, must take the necessary steps to be classified as combatants. Until that occurs they are not entitled to assert the combatants' privilege against any domestic law claims made against them for damage done by drone strikes. There are a variety of organizational paths available to meet this requirement, but one of them should be taken soon.

Thank you to the Subcommittee, chairman and members for considering my submission. I would willingly entertain any follow up questions or additional viewpoints on these issues.

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